

In the Matter of )  
 )  
DAVID A. LARSON ) FOIA Control No. 2009-555  
 )  
On Request for Inspection of Records )

**Released: August 3, 2010**

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the FCC license is being used for.”<sup>5</sup> OET denied Baker’s FOIA request, finding that the information was confidential pursuant to FOIA Exemption 4.<sup>6</sup> Baker filed an application for review.<sup>7</sup>

4. Mann filed comments in response to Baker’s application for review.<sup>8</sup> Mann reiterated its claim of confidentiality with respect to its Exhibit, but further stated:<sup>9</sup>

Nonetheless, in the interest of administrative efficiency and convenience [Mann] is disclosing that it is conducting its experimental research in part to fulfill the requirements of a Cooperative Research and Development Agreement with the U.S. Department of Veterans Affairs. No contract number is assigned to the agreement. Accordingly, the Commission should dismiss the Application for Review as moot.

5. The Office of General Counsel (OGC) agreed with Mann that Mann’s voluntary disclosure rendered the application for review moot. OGC wrote to Baker that “[i]n view of the fact that you have now received the information you requested [*i.e.*, the identity of the contracting agency and the contract number], we believe it is appropriate to close the file on your FOIA request. If we do not hear from you in the next 15 business days, we will assume that you do not wish to prosecute your application for review.”<sup>10</sup> Baker did not respond to OGC’s letter, and OGC closed out the file on Baker’s FOIA request after 15 business days.

6. Following the resolution of Baker’s FOIA request, Larson filed a related request, seeking in part: “1. All government agencies and contract numbers for which the license (file 0255-EX-PL-2004) has been used. 2. All government agencies and contract numbers for which the license (file 0255-EX-PL-2004) has been provided.”<sup>11</sup> Larson based his request on the language in Mann’s response to Baker’s application for review (and OGC’s letter quoting Mann’s response) that “[Mann] is conducting its experimental research *in part* to fulfill the requirements of a Cooperative Research and Development Agreement.”<sup>12</sup> Larson seemed to suggest that the phrase “in part” implied that government agencies other than the Department of Veterans Affairs might be involved.

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<sup>5</sup> See Letter from Brandi Baker to Federal Communications Commission (Dec. 5, 2008) (FOIA No. 2009-146).

<sup>6</sup> See Letter from Julius P. Knapp, Chief, OET to Brandi Baker (Jan. 22, 2009).

<sup>7</sup> See Letter from Brandi Lynn Baker to Office of General Counsel (Jan. 30, 2009).

<sup>8</sup> See Letter from Cheryl A. Tritt to Paula Michele Ellison, Acting General Counsel (Jun. 9, 2009).

<sup>9</sup> *Id.* at 2. The letter’s certificate of service showed that the letter was served on Baker. We hereinafter refer to the Cooperative Research and Development Agreement as the “Agreement.”

<sup>10</sup> See Letter from Joel Kaufman, Associate General Counsel to Brandi Lynn Baker (Jun. 22, 2009).

<sup>11</sup> See Request at 1. Larson’s AFR does not address any other matters raised within his FOIA Request.

<sup>12</sup> *Id.* (emphasis added).

7. OET responded to Larson's FOIA by providing him with a copy of OGC's letter to Baker, which, as noted above, referenced Mann's disclosure that its contract involved the Agreement with the Department of Veterans Affairs.<sup>13</sup> Larson thereupon filed the AFR now before us.

### III. APPLICATION FOR REVIEW AND DISCUSSION

8. The AFR, elaborating on Larson's "in part" argument, states:<sup>14</sup>

This disclosure only "in part" complies with FOIA law and I would like to receive information regarding the "other part", or [an] appropriate exemption should be cited. On its application form 442, [Mann] indicated "yes" that the license was to be used to fulfill a government contract. The FCC required that [Mann] attach, as an exhibit, a description of the agency and the contract number. The FCC disclosure that indicates "the Mann Foundation has responded to your request..." indicates that the FCC is allowing [Mann] to [dictate] the FCC response. The FCC requires the info requested and should already be in possession of the requested info. Further, the reply regarding [Mann] uses language "in part" which clearly indicates that there is another part or agency for which the license is being used for. [Mann] is required to use the license only for the purpose described in the exhibit attached to form 442 as use inconsistent with that purpose would violate FCC regs. The information requested is necessary for the FCC [to fulfill] its mandate and protect the public. The FCC must have this information and must either provide the information or cite [a] FOIA exemption.

9. We have examined the Exhibit to Mann's Form 442. Whatever the reason for Mann's use of the phrase "in part" in its response to Baker's application for review, the Exhibit makes clear that the only government contract to which Mann referred when it answered "Yes" to Item 4 of Form 442 was the Agreement with the Department of Veterans Affairs. Nevertheless, because certain information in the Exhibit is responsive to Larson's FOIA Request,<sup>15</sup> we will release a redacted version of the relevant page from the Exhibit to Form 442 that discloses the identity of the agency.<sup>16</sup> The redacted language on the page refers to the subject matter of the contract and constitutes confidential commercial information, properly withheld under Exemption 4 of the FOIA.<sup>17</sup>

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<sup>13</sup> See Decision at 1. Larson apparently already had a copy of OGC's letter, which he quoted in his FOIA Request. See Request at 1.

<sup>14</sup> See AFR at 1.

<sup>15</sup> We note that there is no contract number associated with the Agreement in the documents located in response to Mann's FOIA request.

<sup>16</sup> Mann has waived any claim of confidentiality with respect to the identity of the agency involved by releasing this information to Baker. We also note that OET conveyed this information to Larson when it sent him a copy of OGC's letter to Baker (which in turn referenced Mann's response to Baker's application for review).

<sup>17</sup> 5 U.S.C. § 552(b)(4) (protecting "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential").

10. We have examined the records at issue here to determine whether we should as a matter of our discretion release the portions of the Exhibit that we have found are exempt from disclosure under the FOIA and that we propose to redact.<sup>18</sup> We decline to exercise our discretion here. First, the unredacted portion of the Exhibit to Form 442 provides Larson with the information he requested, so discretionary release is not necessary to satisfy Larson's FOIA request. Moreover, we do not discern a compelling public interest in the disclosure of this confidential commercial information, particularly when counterbalanced against the potential harm to Mann that would result from release.<sup>19</sup>

#### IV. ORDERING CLAUSES

11. ACCORDINGLY, IT IS ORDERED that the application for review filed by David A. Larson IS GRANTED to the extent described herein. Larson may seek judicial review of this action pursuant to 5 U.S.C. § 552(a)(4)(B).

12. IT IS FURTHER ORDERED that if the Alfred Mann Foundation does not seek a judicial stay within ten (10) working days of the date of release of this memorandum opinion and order, the redacted records will be produced to Larson as specified above. *See* 47 C.F.R. § 0.461(i)(4).

13. The officials responsible for this action are the following: Chairman Genachowski and Commissioners Copps, McDowell, Clyburn, and Baker.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>18</sup> See *Memorandum to Heads of Executive Departments and Agencies, Freedom of Information Act*, 74 Fed. Reg. 4683 (2009) (President Obama's memorandum concerning the FOIA); *The Freedom of Information Act (FOIA)*, available at <<http://www.usdoj.gov/ag/foia-memo-march2009.pdf>> (Attorney General Holder's FOIA Memo); *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd 24816, 24818 (1998) ("Even when particular information falls within the scope of a FOIA exemption, federal agencies generally are afforded the discretion to release the information on public interest grounds."), citing *Chrysler Corp. v. Brown*, 441 U.S. 282, 292-93 (1979).

<sup>19</sup> See U.S. Department of Justice, Office of Information Policy, FOIA Post, *President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines Creating a "New Era of Open Government"* (2009), available at <<http://www.usdoj.gov/oip/foiapost/2009foiapost8.htm>> (recognizing that discretionary release of records is less likely when the requirements of Exemption 4 are met for withholding records).